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In The

Supreme Court of the United States

MARTHA SCARBORO RHEM, personal representative and administrator of the estate of John Rhem, Jr. deceased; R&M ENVIROMENTAL, INCORPORATED, a North Carolina Corporation; JOHN RHEM, JR., a citizen of New Hanover County, North Carolina,

Petitioners,

v.

DANIEL J. BRITAIN, a resident of Georgia; PARAGON INSURANCE SERVICE, INCORPORATED, a Georgia corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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25 pp

QUESTIONS PRESENTED

Was it error by the Court of Appeals in upholding the Trial Court's granting summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure?

A. In the light most favorable to the Plaintiff, did the Plaintiff fail as a matter of law to present evidence showing a breach of contract of the negligence of Daniel J. Britain and Paragon Insurance Services, Inc.?

B. In the light most favorable to the Plaintiff, did Daniel J. Britain and Paragon Insurance Services, Inc., present evidence that R&M Environmental, Inc., was contributorily negligent as a matter of law?

C. If contributory negligence of R&M is found as a matter of law, does that bar any recovery by R&M?

PARTIES

PETITIONERS

MARTHA SCARBORO RHEM, personal representative and administrator of the estate of John R. Rhem, Jr., deceased

R&M ENVIRONMENTAL, INC.

RESPONDENTS

DANIEL J. BRITAIN

PARAGON INSURANCE SERVICE, INC.

CORPORATE DISCLOSURE

R&M Environmental, Inc., who is Petitioner, makes the following disclosure: There is no parent or publicly held company owning 10% or more of the corporation's stock.

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The opinion of the United States Court of Appeals for he Fourth Circuit in *Martha Scarboro Rhem, et al. v. Daniel . Britain, et al.*, 2001 US App. WL 15199 (4th Cir. 1/8/01), s set forth in the Appendix hereto at App. 1.

The Memorandum of Decision of the District Court for the Eastern District of North Carolina in *R & M Environmental, Inc. and John "Jack" Rhem, Jr. v. Daniel J. Britain, et al.* is unreported and set forth in the Appendix hereto at App. 4.

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Fourth Circuit affirming the decision of the District Court for the Eastern District of North Carolina at Wilmington was entered on January 8, 2001. This Petition for Writ of Certiorari is filed within 90 days from that date. 28 U.S.C. §2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Code of Laws of South Carolina 1976 Annotated
Title 42. Workers' Compensation

§ 42-1-150. "Employment" defined.

> The term "employment" includes employment by the State, all political subdivisions thereof, all public and quasi-public corporations therein and all private employments in which four or more employee are regularly employed in the same business or establishment.

Code of Laws of South Carolina 1976 Annotated
Title 42. Workers' Compensation

§ 42-15-10. State law under which claim is authorized to be filed.

> Any employed covered by the provisions of this Title is authorized to file his claim under the laws of the state where he is hired, the state where he is injured, or the state where

his employment is located. If an employee shall receive compensation or damages under the laws of any other state, nothing contained in this section shall be construed to permit a total compensation for the same injury greater than that provided in this Title.

STATEMENT OF THE CASE

Appellant John "Jack" Rhem, Jr., was the president and principle shareholder of Appellant, R & M Environmental, Inc., which operated continuously since 1991 with operations in North Carolina, South Carolina, Virginia, Georgia and Tennessee in the fields of asbestos removal and insulation installation. Each year since 1991, R & M obtained workers compensation insurance coverage from various companies via the assigned risk pool in North Carolina. Their policies from February, 1992 to May 4, 1996 were provided by Aetna Insurance Company. Since May 4, 1995, Appellee, Daniel J. Britain, vice president and principal of Appellee, Paragon Insurance Service, Inc., was the insurance agent for those assigned risk policies. All of those policies indicated in the information page in Item 3A, that the policy applied to the workers compensation for North Carolina. This was where R & M had their permanent office and a majority of their jobs. However, in each of these prior policies, 3C of the same information page provided that other states could be added upon timely or 30 days notice to the carrier. Although the monopolistic states were excluded from item 3C, all the states where the plaintiffs had jobs, were likely to have jobs, submitted bids, and where they were licensed to do asbestos removal, were included.

In January and February of 1996, R & M was bidding on and ultimately received a job with Bechtel Savannah River in South Carolina. Several conversations and notifications were made to Appellee Britain regarding this

job. On April 11, 1996, Appellee Britain sent a North Carolina Rate Bureau Workers Compensation application to plaintiff. Appellant Rhem signed the application and returned it to Defendant Britain and it was filled out by Britain. At no time did R & M request any change from any of their prior coverages. Prior to this, Appellee Britain was aware that there was a job set to proceed in South Carolina.

On May 8, 1996, an employee of R & M, Kem D. Dugger, allegedly during the course and scope of his employment sustained a back injury. Within 48 hours of that accident, Steve Mullen for R & M contacted Appellee Britain and informed him of the accident.

On May 13, 1996, Appellee Britain faxed to R & M a message identifying that the May 4, 1996 to May 4, 1997 workers compensation coverage was assigned to Travelers Companies. This was the first notice that R & M had received that the workers compensation insurance was now issued by Travelers. Attached to the May 13, 1996 fax was a document from the North Carolina Rate Bureau designating Travelers Insurance Company as the carrier, the coverage effective date as May 4, 1996 and it requested that Travelers "issue a standard workers compensation employers liability insurance policy effective 12:01 a.m. on the designated coverage effective date." R & M assumed that a standard workers compensation policy was the workers compensation policy that they had received in the prior years.

On June 18, 1996, Kem D. Dugger filed a Form 50 and began a workers compensation action before the South Carolina Workers Compensation Commission. On Friday, June 21, 1996, Appellee Daniel J. Britain and Steve Mullen for R & M had a phone conversation regarding the South Carolina workers compensation action. On June 24, 1996, Daniel J. Britain sent a fax to R & M. In that fax, Britain claimed ignorance of R & M employing labor from South Carolina to work at the South Carolina job site as required by federal law. Britain represented that Travelers would "add the South Carolina and Georgia codes on an 'if any' basis

(premium picked up at audit) effective 5/4/96 to 97." Also, on June 24, 1996, Britain faxed a letter to underwriter, Kerry May, at Travelers requesting the policy change to "add 3A coverage as follows: (effective 5/4/96-97) South Carolina, Georgia." This was per his instructions from the underwriting assistant, "Samantha", at Travelers. On June 27, 1997, Britain faxed to R & M a message stating that Travelers had "added SC and GA coverage effective 6/24/96 as per your request."

On July 5, 1996, Britain sent to R & M the Travelers Insurance Company policy which was issued on May 23, 1996, after the Dugger accident had taken place and retroactively effective May 4, 1996 to May 4, 1997. In this policy, under the 3C section entitled "other states insurance," where in all prior policies the "other states coverage" was listed as applying to "all states except . . .," and thereafter listed specific states, for the first time where prior policies had listed "all states except", the policy read "COVERAGE EXCLUDED." Travelers now disputes that they represented that the 3A coverage for South Carolina and Georgia would be applied retroactively as set forth in defendant Britain's correspondence.

On August 6, 1996, Kem D. Dugger was mailed a letter, copied to R & M from Vicki Crouse, claims representative at Travelers, who was denying Dugger's claim based on his lack of cooperation in completing the Travelers investigation. Also on that date, Vicki Crouse sent a letter, copied to plaintiffs, to Kem Dugger's attorney, Russell Keep, regarding Travelers' investigation of the Kem Dugger claim. On September 4, 1996, attorney John Talley for Travelers sent a letter to Steve Mullen at plaintiffs requesting information of Mr. Dugger to prepare the defense of the claim and notified plaintiffs for the first time that there may be a question as to the coverage.

On September 12, 1996, Steve Mullen for the plaintiffs provided John Talley with information regarding Kem Dugger's accident and injuries pursuant to his request.

On January 2, 1997, a hearing was conducted before the Workers Compensation Commission of South Carolina. Present at that hearing was attorney John Talley and Steve Mullen, vice president of plaintiff, R & M. At that time, Steve Mullen and plaintiffs learned that Travelers was denying coverage and would not perform their duty to defend or their duty to indemnify R & M for any judgment or settlement. Despite legitimate arguments against Mr. Dugger's scope of injuries and questions as to whether he had actually been injured on the Savannah River job, those arguments were never raised. John Talley refused to raise them on behalf of R & M and they court would not allow the corporation to be represented pro se. On May 7, 1998, a Complaint was filed in the State of South Carolina, County of Aiken, entitled "Bechtel Savannah River, Inc., and Employers Insurance of Wausau, plaintiffs. vs. R & M Environmental, Inc." Plaintiffs in that action have obtained an order against R & M Environmental, the defendant in that suit and the Plaintiff/Appellant in the present suit for their reimbursement and indemnification of the payments that they made to Kem D. Dugger pursuant to his accident on May 8, 1996, pursuant to the work contract between Bechtel and R & M and pursuant to South Carolina, including $64,914.00 in certain medical expenses to be paid and for attorneys fees and other proper relief.

In March, 1999, a consent order in the South Carolina Workers Compensation Commission was handed down whereupon R & M agreed that at this point in time no defenses were possible against the claim of reimbursement or indemnification by Bechtel Savannah River pursuant to contract of South Carolina and submitted to consent order in the South Carolina Industrial Commission finding R & M Environmental liable for the amounts paid by Bechtel Savannah River to Kem Dugger.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

Petitioner moves for a review on writ of certiorari based on the misapplication by the trial court and the court of appeals of the federal rules of civil procedure, specifically rule 56, in a manner far departed from the law and the accepted course of judicial proceedings as to call for this court's supervisory powers.

Daniel J. Britain and Paragon Insurance Service, Inc., were experienced in the workers compensation field and represented that to R & M. R & M relied on Britain and Paragon in providing them with all necessary workers compensation and for complete coverage for all of their operations. No operation was hidden from either Britain or Paragon and, in fact, they fully acknowledged that they were aware of work occurring in South Carolina. While no specific request was recalled by R & M to obtain workers compensation insurance in South Carolina, it was understood that R & M was paying Dan Britain and Paragon to provide them with complete workers compensation insurance. It is inconceivable that any business would request incomplete workers compensation coverage.

R & M incurred a workers compensation claim in May, 1996 which was not insured due to the negligence of Britain and Paragon. In repeated situations, Britain and Paragon revealed a flagrant disregard for the needs of the insured. They certified to BSRI that coverages were in place for a job when they were not. Britain was able to correct his "oversight" regarding the employers liability limit after the fact, was unable to fix his breach of duty in providing proper state coverage. Britain accuses R & M of their failure to inform him of South Carolina operations, yet he certified to BSRI that workers compensation statutory limits were in effect in the jurisdiction wherein the work was to be performed. There was no South Carolina workers

compensation coverage effective 5/4/96 because Mr. Britain failed to request it.

Mr. Britain owed a duty to R & M to exercise reasonable care and properly effecting insurance coverage to fit their needs. He failed to issue the policy which he had promised, he assured the insured he was covered when he was not, and he procured a policy which was materially deficient. R & M relied on Britain's expertise and suffered an uninsured loss as a result.

There was no contributory negligence on the part of R & M for signing an application either in blank or with information supplied by Britain on the application as R & M had provided all information necessary to provide complete workers compensation coverage to Britain and they had no knowledge of any deficiencies in any application. In addition, they were unable to review any policy until two months after the accident occurred.

Even if contributory negligence can be found as a matter of law, R & M can still recover based on the comparative negligence doctrine applied by South Carolina law. South Carolina law applies in this case as virtually all the significant events and occurrences which led to and constitute the injuries in this case occurred in South Carolina.

I. DUTY OF DANIEL J. BRITAIN AND PARAGON INSURANCE SERVICE, INC.

It has long been the law in North Carolina as a general rule that ". . .where an insurance agent or broker undertakes to procure a policy of insurance for another affording protection against a designated risk, the law imposes upon him the duty and the exercise of reasonable care to perform the duty he has assumed, and within the amount of the proposed policy he may be held liable for the loss properly attributable to his negligent default." Elam v. Smithdill Realty and Insurance Company, 182 N.C. 599, 109

S.E. 632 (1921). The law has recognized that there is not only a contractual relationship between an agent who has undertaken to procure a policy of insurance for his principal, but it is also a fiduciary relationship. R-Anel Homes, Inc. v. Alexander and Alexander, Inc., 62 N.C. App. 653, 303 S.E.2d 573 (1983). The Courts have also recognized that insurance policies are frequently difficult to understand and take that into account when determining the agent's duty. Kirk v. R. Stamford Webb Agency, Inc., 75 N.C. App. 148, 330 S.E.2d 262 (1985).

South Carolina law tracks similarly with North Carolina law in holding that an insurance agent procuring insurance is required to exercise "good faith, and reasonable skill, care and diligence in performing the obligation. If the agent or broker fails, because of his fault or neglect, to procure the insurance, or does not follow instructions, or if the policy is materially deficient . . . he is liable to his principal. . . ." Riddle-Duckworth, Inc. v. Sullivan, 253 S.C. 411, 171 S.E.2d 486, 490 (1969). The Riddle-Duckworth court also found that the reasonableness of the agents and insureds' actions should be viewed in light of the fact that the agent was licensed and held himself out to the public as knowledgeable in the insurance industry and the insured, while experienced in general matters, was not experienced in the insurance field. Riddle-Duckworth, 171 S.E.2d at 492.

II. BREACH OF DUTY BY BRITAIN AND PARAGON

Britain and Paragon, despite the fact that an R & M employee was injured in an R & M operation and the workers compensation policies that Dan Britain and Paragon provided to R & M did not cover the employee's accident, contend that they did not breach their duty to R & M. Britain and Paragon further contend that R & M never requested South Carolina; that on the application for assigned risk coverage to the North Carolina Rate Bureau,

only North Carolina coverage was requested; and that R & M gave incorrect information when allegedly told Britain and Paragon that only North Carolina employees would be used and all other employees would come from a certified labor pool with their own separate workers compensation policies.

R & M contends and is prepared to offer through the opinions of their expert witness, John Hicks, that Daniel J. Britain and Paragon breached their duty of care in the following ways:

a) Failing to provide South Carolina Workers Compensation coverage when they knew that R & M Environmental had a job in South Carolina;

b) Failing to adequately explain to Jack Rhem or R & M Environmental what the proper response was to the Rate Bureau application question regarding operations in states other than North Carolina;

c) Failing to recognize that place of residence was irrelevant in determining 3A Workers Compensation coverage;

d) Failing to adequately inquire regarding types of employees R & M hired for the South Carolina job and where they were hired;

e) Failing to understand the laws of South Carolina regarding persons eligible for Workers Compensation.

Mr. Rhem faithfully purchased workers compensation insurance to cover his employees. He stated in his testimony that he understood that workers compensation insurance would cover him anywhere he had a license to work, and that it would cover anyone on his payroll wherever they worked. He also stated that it was his understanding that any employees hired by R & M were North Carolina employees. (App p. 438). He had good reason to expect that his policy would cover employees working outside of North Carolina, because his insurance company had paid benefits to the injured worker in 1992 in Louisiana.

Mr. Rhem relied on the expertise of his insurance agent to provide him the same level of service that R & M sought to provide to their clients. They expected to receive the same coverage as they had in the past. In their testimony, both Mr. Rhem and Mr. Mullen admitted that they knew very little about insurance, and relied on Mr. Britain to provide appropriate insurance coverage.

Mr. Britain completed the workers compensation application for R & M as is often customary for agents to do for their insureds. Insurance applications are confusing and complicated to most insureds, many agents of both the insurance expertise and most if not all of the client's information necessary to complete the form. What Mr. Britain failed to do with this application was to take the information he had been given by his insured to correctly reflect their exposures.

III. FAILURE TO REQUEST SOUTH CAROLINA COVERAGE

Dan Britain and Paragon were aware and involved in the bidding process for the South Carolina Savannah River job by R & M in the following respects:

a) On February 12, 1996 and February 13, 1996, Steve Mullen, for R & M, faxed to Carolyn Mobley at Paragon information regarding the Savannah River site and a bid bond request form.

b) On April 1, 1996, Steve Mullen, for R & M, faxed to Dan Britain a request for changes in the liability coverage at the Savannah River site. Included in the fax was the Savannah River requirements for insurance. The document stated as follows: "A. The Subcontractor shall procure and thereafter maintain at its own expense the following insurance: (1) Workers' Compensation and Employer's Liability, Limits of Liability: Workers' Compensation: Statutory limits in the jurisdiction wherein the work is to be performed."

c) On April 2, 1996, Steve Mullen, for R & M, faxed to Daniel J. Britain, a request for insurance on building materials at Bechtel-Savannah River.

d) On April 3, 1996, Daniel J. Britain, for Paragon, sent a fax to Doug Barclay at

Bechtel Savannah River attaching a certificate of insurance to Bechtel Savannah River, Inc., and mailed a hard copy to P.O. Box 616, Aiken, South Carolina, 29802.

e) On April 11, 996, Steve Mullen, for the R & M, faxed to Pamela at Paragon Insurance Service, Inc., a "bid bond request form" which identified the project they were bidding on was the Bechtel Savannah site near Aiken, South Carolina. (App. pp. 256-265).

Dan Britain has admitted on several occasions, the most recent admission being his unverified statement attached as Exhibit A to his memorandum in support of his motion for summary judgment, that he was aware that R & M had either begun or were planning to begin work in South Carolina. He was providing certificates of insurance for builders risk on the building materials as well as providing certificates of insurance on the prior Aetna policy. He was also aware of the Savannah River requirement that that workers compensation insurance must be the statutory limits in the jurisdiction where the work is to be performed.

Also, Mr. Britain was aware that R & M had one contract for $400,000.00 and a bid on a second one at this job site. It would certainly be reasonable to expect some local labor might be needed at jobs of that size. And even if R & M leased all necessary workers from the "labor pool," Mr. Britain had made no insurance provisions for them.

The lack of recollection of anyone at R & M where South Carolina coverage was specifically requested is not fatal because as it is clear that Britain and Paragon were aware of the operations of R & M and that R & M requested coverage for all his operations and Plaintiffs were relying of Dan Britain to provide full coverage.

It is inconceivable that any business who would follow proper business practices and request workers compensation coverage would not want coverage in some locations versus other locations. Dan Britain had a duty to provide full coverage, including South Carolina. Dan Britain in fact recognizes this duty and contends that he did provide full coverage based on the information that Mr. Rhem provided him. Mr. Britain's contention is not that R & M did not request full coverage but that employees working in South Carolina for R & M would be "South Carolina employees." Mr. Britain then contends that as that was the case he did not need to provide additional South Carolina workers compensation coverage. Although R & M denies that they represented to Dan Britain that all their other employees in South Carolina would be in a temporary labor pool and have their own workers compensation insurance, even taking that as true, Dan Britain did not even provide South Carolina coverage for R & M's "North Carolina employees." South Carolina law is clear that residency of an employee is irrelevant and that the place of injury allows an employee to proceed in South Carolina workers compensation. Dan Britain therefore agrees that his duty was to provide full coverage for R & M's business. However, he negligently failed to provide that coverage.

IV. APPLICATION ONLY REQUESTED NORTH CAROLINA COVERAGE

Beyond its argument that R & M failed to request South Carolina coverage, Britain and Paragon also advance the argument that R & M affirmatively requested only North Carolina coverage. This defense is based on the application for workers compensation insurance sent to the North Carolina Rate Bureau. The questions of relevance are two questions in number 11 to the application, "Are there operations in states other than North Carolina?" and "Are you requesting coverage for any of those states?" Both of

these are answered "no". Jack Rhem has testified that this application was blank. Mr. Rhem only signed the application. There is a question of fact as to whether or not Rhem even saw the completed application. Rhem has also testified that it is his understanding that operations meant the principle office which was located in Wilmington, North Carolina. This information was derived from prior experience with prior agencies and workers compensation policies. Whether or not that is a correct statement of the law is irrelevant. It goes to show that there is a question of fact as to whether or not R & M intended to exclude their operations in South Carolina from workers compensation coverage. Again, Dan Britain was fully and completely aware of the South Carolina operation and yet either filled out the application without requesting coverage in South Carolina or allowing it to be completed in that manner when it was clear and obvious that there was a job in South Carolina. In fact, Dan Britain had in fact certified to Bechtel on April 3, 1996 that R & M had workers compensation statutory limits "in the jurisdiction wherein the work is to be performed." (South Carolina). Purely from an extra territorial perspective, Mr. Britain should have included any states into which North Carolina employees traveled for jobs. At the very least, Dan Britain and Paragon had a duty to investigate in the industry the definition of "operations" and to determine what coverage was needed.

V. PLAINTIFF ONLY REQUESTED COVERAGE FOR NORTH CAROLINA EMPLOYEES

R & M denies that it limited its request for workers compensation to North Carolina and that all other non-North Carolina employees were from a certified labor pool and would be covered under their own separate policies of insurance. Nevertheless, this has been the Britain and Paragon's chief contention. Daniel J. Britain has stated that he provided workers compensation insurance for R & M and

their operation in South Carolina only for "North Carolina employees" of R & M and that it was his understanding that all other non-North Carolina employees would be covered with their own insurance.

First, on the application, under supplemental information, question number one asks "Do you lease workers from a labor contractor?" to which Britain answered again "no." If Mr. Britain believed that workers were being leased, and were fully insured, he would have had to answer yes to the supplemental information question one. He neither did that, nor did he ever request information in the form of the certificate of insurance on how these "fully insured temporary abatement workers" were covered.

Second, this distinction is irrelevant. According to the law in South Carolina, any employee injured on a job site physically located within the State of South Carolina is allowed to file their workers compensation claim in the State of South Carolina under the laws of South Carolina in the South Carolina Industrial Commission. (S.C.W.C. Code §42-1-150; §42-15-10). Therefore, place of residency or a distinction between "North Carolina" and "South Carolina" employees is irrelevant as any R & M employee injured on the job at Savannah River could have filed in the State of South Carolina and coverage for that claim would have been denied by Travelers. Dan Britain failed to recognize this at the time. He failed to recognize that even after the Kem Dugger accident and allowed several more months to go by while R & M continued to work without obtaining them coverage or properly warning them of the problems with the coverage. Dan Britain fails to recognize it to this day. Even if R & M only had "North Carolina employees," it still would be uncovered for claims made in South Carolina occurring at their Savannah River project. Therefore, Dan Britain not only failed to obtain proper coverage for Plaintiffs, he failed to even obtain the coverage that he has alleged was asked of him.

VI. CONTRIBUTORY NEGLIGENCE

Findings of contributory negligence as a matter of law are rarely appropriate by the Court as generally there is a question of fact for the jury to determine. Hall v. Kmart Corp., 525 S.E.2d 837 (N.C. App. 2000). The law in North Carolina does provide that where a person signs an insurance policy or other formal agreement he does so with the knowledge that the contents will be imputed to him and a duty exists for the insured to read the terms of an insurance policy. Kirk v. R. Stamford Webb Agency, Inc., 75 N.C. App. 148, 330 S.E.2d 262 (1985); Elam 109 S.E. at 634. An exception or qualification to the rule is that nothing has been said or done to mislead the insured or to ". . .put a man of reasonable business prudence off his guard in the matter." Elam 109 S.E. at 634.[1]

The policy of insurance was not provided until July, 1996, well after the accident. The alleged "failure to read" was for the form application to the North Carolina Rate Bureau, not a formal policy of insurance. According to Rhem, he was informed by Britain that the matter needed to be taken care of immediately and little time was given to study or ask questions regarding the application. Rhem reasonably relied on Britain's representations that he was knowledgeable in the insurance industry; that the policy would be the same as prior policies which did contain provisions that would have covered South Carolina operations; that Britain was intimately involved and aware of the South Carolina operations. A reasonable assumption would be made that Dan Britain would provide for workers compensation for the South Carolina operations.

The law in South Carolina is similar regarding contributory negligence for the failure to read a policy. They acknowledge the fact that the insurance agent is the more

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[1] It should also be noted that neither Elam nor Kirk found that failure to read a policy was contributory negligence as a matter of law.

knowledgeable person in the relationship and that the Plaintiffs must not only be able to read the policy, but also to understand the policy. In addition, with a fiduciary agent insured relationship, the general rules of arms length contract negotiations are less exacting and it is more reasonable for an insured to rely more heavily on his agent. Orangeburg Sausage Company v. Cincinnati Insurance, 450 S.E.2d 66 (S.C. App. 1994).

South Carolina has also adopted the Doctrine of Comparative Negligence. Nelson v. Concrete Supply Company, 303 S.C. 243, 399 S.E.2d 783 (1991). This doctrine allows a Plaintiff to recover damages if his negligence is not greater that defendant's. Plaintiff contends that even if they are found to be negligent as a matter of law, their negligence does not rise to the level of Defendant's, as a matter of law. R & M contends that South Carolina law is the proper law to apply.

VII. CHOICE OF LAW

In United Dominion Industries, Inc. v. Overhead Door Corp., 762 F.Supp. 126 (W.D.N.C. 1991), the court granted the defendant's motion to dismiss and based its decision on an analysis of North Carolina's choice of law rules involving an unfair and deceptive acts claim. In so ruling, the stated:

> "[t]he North Carolina courts may apply the traditional lex loci delicti rule or the modern 'most significant relationship' test. A review of the case law, as shown below, yields no clear answer because the North Carolina Supreme Court has not specifically addressed the issue and the Court of Appeals has used both tests recently. . . . The North Carolina Court of Appeals applied the lex loci test to a claim based upon [the Unfair and Deceptive

> Trade Practices Act] in United Virginia, 339 S.E.2d at 93-94. The court considered the most significant relationship test, but found that the 'better rule' chooses the law of the place where the injuries are sustained. The court explained that the 'law of the state where the last act occurred giving rise to the defendants' injury governs' the action. Id. at 94. Similarly, the Fourth Circuit has interpreted Lloyd v. Carnation Co., 61 N.C. App. 381, 301 S.E.2d 414 (1983), as requiring the application of the law of the state where the injuries are sustained. ITCO, 722 F.2d at 49 N. 11. In 1988, the North Carolina Supreme Court refused to adopt the most significant relationship test in a products liability case and instead reaffirmed the well-settled rule of lex loci in tort actions, explaining that '[f]or actions sounding in tort, the state where the injury occurred is considered the situs of the claim.' Boudreau v. Baughman, 322 N.C. 331, 368 S.E.2d 849, 854 (1988).

The court went on to discuss the most significant relationship test, and concluded that "[i]n the absence of a method to refer questions [regarding choice of law] to the North Carolina Supreme Court, this court must [prognosticate] how the North Carolina Supreme Court would resolve" this issue. United Dominion Industries, Inc. v. Overhead Door Corp., 762 F.Supp. 126, 129 (W.D.N.C. 1991). The court in United Dominion concluded that "North Carolina would apply the traditional lex loci rule rather than the most significant relationship test."

The Plaintiff in United Dominion argued that the place of injury is the corporate headquarters because that is where the financial damage was felt. However, the court

rejected that argument and instead ruled in favor of the defendant which argued that "the injury was sustained where the last act which caused the injury took place." Id. at 130.

In Lowe's Carolina Wilkesboro Hardware, Inc., v. Fidelity Life Insurance Company, 319 F.2d 469 (4th Cir. 1963), the court analyzed an action for negligent delay in acting upon an applicable for a life policy, and the Court of Appeals held that the law of Pennsylvania was controlling on the question of whether the action could be maintained where home office of insurer was in Pennsylvania where the only act which occurred in North Carolina was the completion of the application form. There were claims for punitive damages and bad faith and the court held that the law of the jurisdiction which held the most significant relationships with the alleged wrong would apply in a diversity action brought in North Carolina in order to determine whether such an action could be maintained.

In Clark v. B.H. Holland Company, Inc., 852 F.Supp. 1268 (E.D.N.C. 1994), the court quoted the Fourth Circuit with respect to North Carolina's choice of law rule in a life insurance negligence case where the Fourth Circuit stated that "we find it most reasonable . . . to avoid a rigid rule and to pursue instead a more flexible approach which would allow the court in each case to inquire which state has the most significant relationships with events . . . The relative weight due particular factors will vary from case to case, and the court must judge the totality of the contacts of the states concerned with the parties and the subject matter." Lowes North Wilkesboro Hardware, Inc., 319 F.2d at 473.

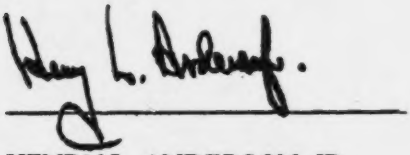
In the case before the court, the "state where the injury occurred" and the state in which the "last acts which caused the injury" clearly is South Carolina. Even if the most significant relationships tests were applied, South Carolina law should apply. The acts which did not occur in South Carolina which lead to the injuries sustained in this action occurred in multi-state interstate commerce via telephone, fax and mail. Virtually all of the significant

events, acts, and occurrences which led to and constitute the injuries in this case occurred in South Carolina including: (1) the physical injury to the employee which led to the workers' compensation claim; (2) the denial of that claim by Travelers in the South Carolina Industrial Commission; (3) the lawsuit seeking/awarding compensation to Savannah Bechtel for their subrogation claim filed in Aiken; (4) the coverage disputed was to cover South Carolina; (5) the frequent contacts with South Carolina by Defendants; (6) and the filing of the Industrial Commission workers compensation action by the injured worker.

CONCLUSION

As the Court of Appeals has far departed from the law and the accepted course of judicial proceedings, this Court's supervisory powers are required as this matter should be heard before the United States Supreme Court.

Respectfully submitted,



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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-2011

Entered: January 8, 2001

MARTHA SCARBORO RHEM, personal representative and administrator of the estate of John Rhem, Jr., deceased,

Appellant,

R&M ENVIRONMENTAL, INCORPORATED, a North Carolina Corporation; JOHN RHEM, JR., a citizen of New Hanover County, North Carolina,

Plaintiffs - Appellants,

versus

DANIEL J. BRITAIN, a resident of Georgia; PARAGON INSURANCE SERVICE, INCORPORATED, a Georgia corporation,

Defendants - Appellees,

and

THE TRAVELERS COMPANIES, a Connecticut corporation; CITIGROUP INCORPORATED, a corporation authorized to do business in North Carolina; TRAVELERS INSURANCE COMPANY,

Defendants.

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. James C. Fox, District Judge. (CA-99-99-7-F)

Submitted: December 21, 2000 Decided: January 8, 2001

Before LUTTIG, MICHAEL, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Bradley Andrew Coxe, ANDERSON, DANIEL & COXE, Wrightsville Beach, North Carolina; David Bruce Collins, Jr., Wilmington, North Carolina, for Appellants. Andrew J. Hanley, CROSSLEY, MCINTOSH, PRIOR & COLLIER, Wilmington, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Appellants appeal the district court's order granting summary judgment to Defendants in their civil action. We have reviewed parties' briefs, the joint appendix, and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. R&M Envtl., Inc. v. Britain, No. CA-99-99_7-F (E.D.N.C. July 12, 2000). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

No. 7:99-CV-99-F(1)

FILED
July 12 '00
David W. Daniel, Clerk
Eastern No.Car.

R & M ENVIRONMENTAL, INC.; and JOHN "JACK" RHEM, JR., U.S. District Court
Plaintiffs,

v

DANIEL J. BRITAIN; PARAGON INSURANCE SERVICE, INC.; and TRAVELERS INSURANCE COMPANY,
Defendants.

ORDER

Entered: July 12, 2000

On March 20, 2000, the undersigned entered an order holding in abeyance the plaintiff's motion to modify the discovery plan until after the substituted defendant, Travelers Insurance Company filed its Answer or otherwise responded to the Amended Complaint. The court further ordered the deadlines in effect pursuant to the September 27, 1999, scheduling order stayed until after Travelers filed its Answer and the court ruled on the motion to modify the discovery plan.

On March 29, 2000, Travelers filed its Answer and a Motion to Dismiss. The motion was fully briefed by all

parties and on June 2, 2000, the undersigned entered an order allowing Travelers' Motion to Dismiss and denying the plaintiffs' Motion to Modify (Docket #36) and Motion to Compel (Docket #34) as moot,[1] because the court perceived that both motions pertained to matters relating only to Travelers.[2] Although more than a week had passed since the court dismissed the case against Travelers, on June 13, 2000, the plaintiffs filed two more motions to modify the discovery schedule (Docket ## 61 & 62), explaining that they had been awaiting an order from the court regarding their motion to compel written discovery from Travelers Insurance Company and for a filing on their motion to modify the discovery order.

These new motions to modify the discovery plan sought leave to add a new expert witness and to take the deposition of defendant Daniel J. Britain. Plaintiffs explained that they notified the defendants of their desire to designate Martha Bachman as a "new expert" by letter dated March 30, 2000. Plaintiffs had retained Ms. Bachman on March 3rd in partial reliance on the court's order staying the discovery period as well as its indication that some modification of the discovery may be required." Plaintiffs' Motion to Modify Discovery Plan to Designate Martha Bachman, at p.4. The deadline for designating "expert witnesses" expired on January 3, 2000, well before the court stayed discovery deadlines. The plaintiffs have suggested no

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[1] The plaintiffs have explained that they filed these motions in the event the court denied their motion to substitute Travelers Insurance Company for defendants, The Travelers Companies and CitiGroup, Inc. Because the court allowed Travelers Insurance Company to be substituted, the Motion to Compel was rendered moot.

[2] The Clerk of Court allowed Travelers' Motion for Extension of Time within which to respond to the plaintiffs' first set of interrogatories and requests for production of documents until June 22, 2000 - exactly one year from the date on which the plaintiffs initially proffered discovery requests on Travelers' predecessor defendants. *See* Docket # 56.

reason for permitting this late designation that, if allowed, would also necessitate reopening discovery. Plaintiffs' Motion to Modify in order to Designate Martha Bachman is DENIED.

Plaintiffs also wish to modify the discovery plan in order to depose defendant Daniel J. Britain, who has been a defendant since filing of the original Complaint on June 21, 1999. Although discovery was scheduled to close on April 3, 2000, plaintiffs did not notice Britain's deposition until Tuesday, March 28, 2000. Britain and his counsel purchased airline tickets to attend the deposition, but plaintiffs' counsel became ill and had to cancel the deposition on two days' notice. Plaintiffs explain that they had not scheduled Britain's deposition any earlier because they wanted to have all the written discovery from Travelers in hand before questioning Britain. Furthermore, plaintiffs explain that they did not schedule Britain's deposition after the April 3, 2000, deadline for the close of discovery because of the court's March 17, 2000, order staying deadlines then in effect.

The court has carefully reviewed Britain's and Paragon's pending Motion for Summary Judgment and the plaintiffs' response thereto in an effort to determine whether deposing Britain now could have an impact on plaintiffs' ability to defend the dispositive motion. Having done so, the court is of the opinion that, in light of testimony given by plaintiffs' agents, Rhem and Mullen, Britain's declaration, and the documentary evidence of record, plaintiffs could not elicit from Britain any testimony that could prevent entry of summary judgment on behalf of Britain and Paragon.

A district court must enter judgment against a party who, "after adequate time for discovery...fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Beard Plumbing and Heating, Inc. v. Thompson Plastics, Inc.*, 152 F.3d 313, 315 (4th Cir. 1998). Where "there is no genuine issue as to any material

fact and...the moving party is entitled to judgment as a matter of law," entry of summary judgment is mandated. Fed. R. Civ. P. 56(c); *Stone v. Liberty Mutual Ins. Co.*, 105 F.3d 188, 190 (4th Cir. 1997). To avoid summary judgment on a defendant's motion, a plaintiff must produce evidence creating a genuine issue of material fact. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). In determining whether a genuine issue of material fact is in dispute, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

In this case, the plaintiffs have asserted nine claims against Britain and Paragon: breach of contract, negligence, bad faith, bad faith/punitive damages, unfair and deceptive trade practices, fraud/constructive fraud, estoppel/restitution/unjust enrichment, principal's liability where agent's position permits deception, and business interruption. Plaintiffs seek punitive damages, attorneys' fees, actual damages and treble damages under N.C. GEN. STAT. § 75-16.1.

A thumbnail sketch of the factual predicate for the lawsuit is as follows. After several years of dealing with United Agencies as its insurance agent, R&M, began acquiring insurance through Paragon and its agent, Dan Britain. R&M was bidding on a job in South Carolina and needed a certificate of Workers' Compensation insurance coverage. R&M asked Britain to obtain a "standard coverage" policy through the North Carolina Rate Bureau's ("NCRB") assigned risk program. As explained by the defendants, the NCRB provides a mechanism whereby insurance is bound by the NCRB for 30 days then assigned to an insurer licensed in North Carolina. *See* N.C. GEN. STAT. § 58-36-1. A company seeking Workers' Comp insurance through this plan completes an application, the

insurance is bound by the NCRB, then assigned randomly to a licensed insurer. Neither the insured, its agent, nor even the insurer knows which company will be designated to write the policy until assigned by the NCRB. The application and the company's payroll information are the only documents provided to the NCRB and the insurer describing the coverage requested.

In pertinent part, a summary of the testimony of R&M president Jack Rhem's several depositions, and that of R&M vice president Steve Mullins reveals the following. Rhem testified that it was not his job to arrange for the Workers' Comp coverage for the Bechtal Savannah River job; it was Steve Mullins's job. Steve Mullins testified, however, that it was Paul Belisle's job to arrange for Workers' Comp coverage for the South Carolina job, and that he never discussed the insurance or the application with Britain, because it was not his job. *See* Mullen Depo. at 12, 17, 52, 97.

Although Rhem testified that it was not his job to arrange for Workers' Comp coverage for the Bechtal Savannah River job and that he did not speak to Britain about the Workers' Compensation application or specify to Britain the scope and extent of coverage required, Rhem also testified that he assumed that Britain and Paragon would see to it that R&M obtained the same Workers' Comp insurance that United Agencies had provided to R&M, which apparently had included South Carolina coverage.[3] Rhem

[3] R&M purportedly had obtained assigned risk policies through Britain and Paragon since May 4, 1995. According to Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment, "All of those policies indicated in the information page in Item 3A, that the policy applied to the workers compensation for North Carolina. This was where the Plaintiffs had their permanent office and a majority of their jobs. However, in each of these prior policies, 3C of the same information page provided that other states could be added upon timely or 30 days notice to the carrier....[A]ll the states where the plaintiffs had jobs, submitted bids, and where they were licensed to do asbestos removal, were included [in item 3C]." Plaintiffs Memorandum at 2.

explained that he did not see the April 11, 1996, handwritten cover sheet, addressed to him, on which Britain advised in pertinent part, "Jack, please find attached the North Carolina Rate Bureau Workers Compensation Application. Please read, review, correct, sign and date the application...." Exhibit 12 to Amended Complaint. Rhem testified, however, that on April 22, 1996 he signed a blank application for Workers' Comp insurance without having read it.

Furthermore, Rhem averred that it was his belief, based on an explanation in the "early nineties" by a United Agencies agent, that any worker hired out of R&M's North Carolina office was considered an R&M employee for purposes of Workers' Comp insurance, and that as such, was covered under the "standard policy."[4] Rhem also assumed that any R&M employee was covered by the Workers' Comp insurance regardless of the location of the job site. Rhem admits he did not specifically ask Britain to obtain South Carolina Workers' Comp coverage; he assumed Britain would obtain whatever coverage was required for the job on which Britain knew R&M was bidding. Nevertheless, Rhem states that he did not make the Bechtal Savannah River project insurance arrangements with Britain and that he has no personal knowledge of the arrangements Mullins allegedly made with Britain. Rhem states he only knows what Mullins has told him.

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[4] This lawsuit arose after a South Carolina worker, Dugger, hired by R&M out of its North Carolina office to work on the Bechtal Savannah River project, allegedly was injured on the job on May 8, 1996 and filed a claim for South Carolina Workers' Comp on June 18, 1996. When it was determined that R&M did not have South Carolina Workers' Comp insurance to cover Dugger's claim, Bechtal was required to pay Dugger. Bechtal thereafter successfully sued R&M in Aiken County, South Carolina state court for reimbursement and indemnity. Now R&M seeks, in turn, to recover what it was required to pay Bechtal from Paragon and Britain.

Therefore, plaintiffs' own agents - Rhem and Mullins - both deny personal involvement in the application process. And although Rhem denies any responsibility for the insurance application process, he admits signing the (blank) application without having read it because he assumed Britain and Paragon would procure the same type and scope of Workers' Comp insurance United Agencies had provided in the past. That is, Rhem bases his beliefs in what Britain should have known and should have done on his assumptions, in turn based on representations by a different insurance agent from a different company some five or six years earlier. Rhem testified that he signed a blank insurance application without reading it and returned it for Britain to complete, and that he never saw Britain's note addressed to him directing him to make appropriate "changes" to the application.

Britain, on the other hand, states that he obtained the required information and payroll estimates from Rhem, then "prepared and faxed" the application to Rhem with instructions to make any necessary changes, then sign it. Britain averred that

> Since they were anticipating work in South Carolina, I asked Mr. Rhem when filling out the application if he needed any other Workers' Compensation Insurance, Mr. Rhem informed me that he did not want Workers' Compensation coverage for any state other than North Carolina since all of his employees were North Carolina employees who would work out of the North Carolina office and any local workers would be hired from a temporary labor pool and had their own insurance in place. I was advised that this was R&M's normal practice on these jobs, and that historically any workers used outside of North Carolina were fully self-insured

> subcontractors. If he had told me that he had South Carolina employees I would have advised him to request South Carolina Workers' Compensation Insurance.

Britain Statement, Exhibit A to Defendants' Memorandum in Support of Summary, p. 1-2. Judgment (Docket # 49). Britain added that, as an agent paid on commission based on a percentage of the premium, he certainly would have placed South Carolina Workers' Comp coverage if he had been asked to do so. *See id.* Britain explicitly averred that "Mr. Rhem specifically stated that he did not want South Carolina Workers' Compensation coverage." *Id.* at 3.

The plaintiffs' evidence reveals factual issues, created primarily by its own agents' deposition testimony. That is, Rhem and Mullins each deny under oath, respectively, that he was responsible for obtaining the Workers' Comp insurance at issue. However, Rhem has testified in some detail about his assumptions regarding what insurance would be obtained by Britain and why, as well as regarding his own conduct in allegedly signing a blank insurance application that he had not read. In addition, although Rhem states that he assumed Britain would ensure that the coverage obtained would include South Carolina Workers' Comp coverage, Rhem also sates that he believed he did not need such coverage because he believed that all workers hired out of the North Carolina office were R&M's North Carolina Employees. *See* Rhem Depo. 1, pp. 15, 24; Rhem Depo. 2, pp. 98-99. Another factual issue is revealed upon comparing Rhem's testimony that he did not discuss South Carolina Coverage with Britain, with Britain's testimony that he completed the insurance application based on instructions from Rhem, including the instruction that "he did not want South Carolina Workers' Compensation coverage." Britain Statement at 3.

Assuming the truth of the plaintiffs' position and disregarding the internal inconsistencies thereof, it is

apparent that the "factual issues" are not "material." That is, regardless of whose job it was to obtain Workers' Comp coverage, and regardless of whether Britain completed the application before or after Rhem signed it without reading it, the plaintiffs have not directed the court's attention to any evidence that would tend to establish that the defendants had any responsibility, first to perceive Rhem's confusion about whether or not South Carolina Workers' Comp insurance was required for the Savannah Bechtel job, and second, to ascertain whether the application that Rhem signed was adequate to request such insurance.

"[T]here is a fiduciary duty on the part of the insurance agent to keep the insured correctly informed as to his insurance coverage." *R-Anell Homes v. Alexander & Alexander*, 303 S.E.2d 573, 577 (N.C. App. 1983).[5] The duty arises where plaintiff shows a continuing relationship between agent and insured and a request or advice on some change or contemplated change in the insured's circumstances. In such a situation, the giving of false assurances concerning the extent of insurance coverage may constitute breach of fiduciary duty. *See id.* at 576-77.

In the context of an allegation that an insurance agent had failed to obtain Workers' Compensation Insurance, the North Carolina Court of Appeals addressed how it may be determined whether an insurance agent has undertaken to advise an insured regarding coverage. The court observed that:

> Other jurisdictions have held that an implied undertaking to advise may be shown if: (1) the agent received consideration beyond the mere payment of the premium; (2) the insured

[5] The court rejects the plaintiffs' contention that South Carolina law governs in resolution of the issues raised by the defendants' Motion for Summary Judgment. Rather, the court adopts the defendants' position, as set forth in their Reply (Docket #59).

> made a clear request for advise; (3) there is a course of dealings over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied on.

Bigger v. Vista Sales and Marketing, Inc., 505 S.E.2d 891, 893 (N.C. App. 1998) (citing *Trotter v. State Farm Mut. Auto, Inc. Co.*, 277 S.E.2d 343, 347 (S.C. 1988); *Mullins v. Commonwealth Life Ins.*, 839 S.W.2d 245, 248 (Ky. 1992).

In *Bigger*, the North Carolina Court of Appeals further stated:

> Moreover, "it is...well established that an insurance agent is not obligated to assume the duty of procuring a policy of insurance for a customer." *Baldwin v. Lititz Mut. Ins. Co.*, 99 N.C. App. 559, 561, 393 S.E.2d 306, 307 (1990) (holding that evidence was insufficient to show that agent was liable for failure to procure or maintain insurance on a house after construction). Rather, "an insurance agent has a duty to procure additional insurance for a policy holder at the request of the policyholder." *Phillips v. State Farm Mut. Auto. Ins. Co.*, 129 N.C. App. 111, 397 S.E.2d 325, 327 (1988) (citation omitted). "[T]his duty does not, however obligate the insurer or its agent to procure a policy for the insured which had not been requested." *Id.* (citation omitted). To hold [the agent] responsible for insurance beyond that requested by [the insured] would inappropriately place the burden on the insurance agent and insurance company to procure liability insurance for the [insured].

Bigger, 505 S.E.2d at 894; *see also Kron Medical Corp. v. Collier Cobb & Associates, Inc.*, 420 S.E.2d 192 (N.C. App. 1992).

In *Bentley v. North Carolina Ins. Guar. Ass'n,* 418 S.E.2d 705, 712-13 (N.C. App. 1992), the court determined that the plaintiff had presented no evidence that showed an ongoing relationship between plaintiff and the defendant agents, no evidence that after purchasing the fire loss policy, plaintiff requested further advice or sought assurances from the defendant agent about coverage under the policy, and no evidence that plaintiff sought to purchase additional insurance from the defendants.

Furthermore, the court stated in *Greenway v. North Carolina Farm Bureau Mutual Insurance Co.*, 241 S.E.2d 339, 343 (N.C. App. 1978), "It is clearly not the duty of an insurer or its agent to inquire and inform an insured as to all parts of his policy. We cannot approve the position that in the absence of a request it was the agent's legal duty to explain the meaning and effect of all the provisions in the policy, or that his failure to inquire...was a waiver of the requirements." (Internal quotation omitted).

Here, the plaintiffs have not forecast any evidence that they furnished Britain or Paragon any consideration beyond payment of the premium for the policy, that Rhem, Mullins or anyone else at R&M made "a clear request for advice" from Britain, or that there was a course of dealing over an extended period *between R&M and Britain and Paragon* that would put an objectively reasonable insurance agent on notice that his advice was being sought and relied on with regard to the need for South Carolina coverage. *See Bigger,* 505 W.E.2d at 893. By the instant action, plaintiffs seek to hold Britain and Paragon "responsible for insurance beyond that requested," a claim that the North Carolina Court of Appeals declared "inappropriately place[s] the burden on the insurance agent and insurance company to procure...insurance for the [insured]." *Id* at 894. The plaintiffs' own evidence tends to demonstrate that the

plaintiffs misunderstood the requirements for obtaining Workers' Comp coverage for the Bechtal Savannah River project, but did not reveal facts to the defendants that would cause the defendants to appreciate a duty to correct the plaintiffs erroneous assumptions or to volunteer unsolicited advice. No one on behalf of R&M has claimed responsibility for obtaining the Workers' Comp insurance on the Bechtal Savannah River project, although R&M's president has admitted that he signed the application for such insurance without reading it.[6] On the plaintiffs' own evidence, there appears to be no basis for recovery under any of the nine claims for relief. Moreover, plaintiffs' own evidence by way of Rhem's depositions establishes contributory negligence as a matter of law. *See Kirk v. R. Stanford Web Agency, Inc.*, 330 S.E.2d 262, 264 (N.C. App. 1985) (contributory negligence for failure to read insurance policy or to read or complete application therefor).

Furthermore, the plaintiffs have not revealed, and the court cannot perceive, what Britain could say in a deposition that would cure the effect of Rhem's testimony regarding the Workers' Comp application process. Rhem has been deposed more than once, and plaintiffs' counsel has had ample opportunity to rehabilitate his testimony.

Plaintiffs have explained that they waited until the last minute to notice Britain's deposition because they wanted to have Travelers' discovery responses in hand when they deposed him. *See* Plaintiff's June 13, 2000, Motion to Modify Discovery Deadlines at p.4. Presumably, this strategy was devised because it is plaintiffs' theory that Britain also is responsible for Travelers' refusal to issue *retroactive* South Carolina Workers' Comp coverage requested *after* Dugger allegedly suffered his on-the-job injury. Britain is not an agent of Travelers and plaintiffs

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[6] Because Rhem has testified that he did not read the application before signing, it is immaterial whether Britain filled out the application before or after Rhem signed it.

have not drawn to the court's attention a legal theory on which Britain may be held responsible for Travelers' refusing to provide retroactive insurance coverage for a risk that was not specified in the application for insurance. Plaintiffs refer to Britain's referencing a statement made to him by Samantha, an underwriting assistant at Travelers, upon Britain's request, to "add 3A coverage as follows: (effective 5/4/96 to 97) South Carolina, Georgia." While Britain may have requested such retroactive coverage after Dugger had filed his claim, the 3A coverage that was allowed by Travelers, as related by Britain to plaintiff on June 27, 1997, was "SC and GA coverage effective 6/24/96 as per your request." *See* Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment at 4 (no citation to record). Plaintiffs have not drawn to the court's attention any authority for imposing liability on Britain for Travelers' refusal to make the South Carolina/Georgia coverage retroactively applicable, when the uncontested facts show that the request for such coverage was not made until *after* a Workers' Comp claim already had been filed against the plaintiffs in South Carolina.

Moreover, as a matter of common sense and fairness, the court cannot accept the plaintiffs' implicit suggestion that the defendants should bear the risk of the plaintiffs' misunderstanding of their need for South Carolina Workers' Comp insurance or the application process therefor in light of the plaintiffs' agent's own testimony that he never spoke to Britain about South Carolina insurance and that he relied on the representations of a former insurance agent in forming his belief that he did not need such insurance. The plaintiff has failed to proffer any evidence that would support imposition on the defendants of an implied undertaking to advise R&M on the matter of the need for South Carolina Workers' Comp insurance or the process by which such insurance must be obtained.

Considering all the evidence presented in the light most favorable to the plaintiffs, the court concludes

nevertheless that the plaintiffs have failed to carry their burden to resist entry of summary judgment. For the foregoing reasons, therefore, the court concludes that the plaintiffs have failed to demonstrate the existence of a genuine issue of material fact necessitating trial and that the defendants are entitled judgment as a matter of law. Accordingly, the defendants' Motion for Summary Judgment is ALLOWED and this action is DISMISSED. Fed. R. CIV. P. 56. That being the case, the plaintiffs' Motion to Modify the discovery plan in order to depose Britain is DENIED as moot.

SUMMARY

Plaintiffs' Motions to Modify the discovery schedule (Docket ## 61 and 62) are DENIED. The defendants Motion for Summary Judgment (Docket # 48) is ALLOWED and this action is DISMISSED. All other pending motions are DENIED AS MOOT.

SO ORDERED.

This the 12th day of July, 2000.

S/_____
JAMES C. FOX
United States District Judge